Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of SATELLITE BROADCASTING & COMMUNICATIONS ASSOCIATION PETITION FOR DECLARATORY RULING REGARDING APPLICATION OF THE OVER-THE-AIR RECEPTION DEVICES RULE TO CERTAIN PROVISIONS OF THE CHICAGO ZONING ORDINANCE	CSR-_____

PETITION FOR DECLARATORY RULING

Jeffrey H. Blum
Senior Vice President &
Deputy General Counsel
Alison A. Minea
Corporate Counsel
DISH NETWORK L.L.C.
1110 Vermont Ave NW, Suite 750
Washington, DC 20005
(202) 293-0981

Susan Eid
Executive Vice President,
Government Affairs
Andrew Reinsdorf
Senior Vice President, Government Affairs
Stacy R. Fuller
Vice President, Regulatory Affairs
DIRECTV, LLC
901 F Street, NW, Suite 600
Washington, DC 20004
(202) 383-6300

Lisa Volpe McCabe
Director, Public Policy & Outreach
SATELLITE BROADCASTING & COMMUNICATIONS ASSOCIATION
1100 17th Street NW, Suite 1150
Washington, D.C. 20036
(202) 349-3640

William M. Wiltshire
Michael Nilsson
WILTSHIRE & GRANNIS LLP
1200 Eighteenth Street, NW
Washington, DC 20036
(202) 730-1300
Counsel for DIRECTV, LLC

April 19, 2012

SUMMARY

Last fall, Philadelphia's City Council enacted an ordinance regulating satellite dishes because some Councilmembers think satellite dishes are ugly. DIRECTV, DISH Network, and SBCA argued that Philadelphia's ordinance was precisely the sort of restriction the OTARD rules were designed to prevent. They also warned that the Philadelphia ordinance could become a model for similar aesthetic regulation in other cities unless the Commission acted quickly.

Those fears have proven correct. Chicago has now enacted an ordinance based on Philadelphia's. It shares the Philadelphia ordinance's flaws. But in some ways, it is even worse.

- *Antenna placement.* Both ordinances require antenna placement in preferred locations unless such placement "materially" raises costs or delays installation. This language is different from that in OTARD. Chicago knew OTARD's formulation but deliberately chose a different one—which suggests it meant to be more restrictive.

- *Antenna placement where preferred placement is infeasible.* The Ordinance has a second set of rules governing antenna placement when installation in its preferred location is infeasible. These rules contain no exceptions for cost, delay, and signal preclusion. Chicago, in other words, ignored OTARD completely in drafting this particular provision.

- *Antenna removal.* Chicago's Ordinance also states that unused satellite antennas "shall be disconnected and removed" when no longer in service. This raises costs for low-income and immigrant subscribers, who often disconnect and reconnect service. It raises costs for those who move into new residences, who otherwise could use already-installed antennas. And it raises costs for anyone who attempts to comply with a provision that requires satellite carriers to break the law (users, not satellite companies, own antennas).

- *Justification.* Chicago has made *no* attempt to justify its Ordinance on public safety or historic preservation grounds. The only justification we have is from the Ordinance's sponsor, who claimed that satellite dishes make buildings look "terrible." Perhaps unsurprisingly, Chicago does not regulate any other devices in this manner.

As a legal matter, this is a garden variety OTARD case. It is really no different than any of the dozens of restrictions the Commission has struck down over the years. But the stakes here are much higher. If restrictions such as these are allowed to stand, millions of consumers will lose their choice of television provider, tens of thousands of jobs will be lost, and satellite will lose its ability to compete with cable in urban areas. The Commission cannot let this happen.

TABLE OF CONTENTS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of SATELLITE BROADCASTING & COMMUNICATIONS ASSOCIATION PETITION FOR DECLARATORY RULING REGARDING APPLICATION OF THE OVER-THE-AIR RECEPTION DEVICES RULE TO CERTAIN PROVISIONS OF THE CHICAGO ZONING ORDINANCE	CSR-_____

PETITION FOR DECLARATORY RULING

DIRECTV, LLC, DISH Network L.L.C., and the Satellite Broadcasting and Communications Association (collectively, Petitioners), hereby petition the Commission to declare that changes recently enacted to the Chicago Zoning Ordinance (the "Ordinance") are preempted by the statute and the Commission's implementing rules governing over-the-air reception devices (the "OTARD rules"),[1] and are thus unenforceable. Chicago's Ordinance—much like the Philadelphia ordinance on which it was modeled[2]—is a textbook violation of the OTARD rules. It applies to thousands of satellite antennas subject to OTARD protection. It plainly "impairs" viewing by increasing cost, delaying installation, and precluding reception.

---

1 Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996) § 207; 47 C.F.R. § 1.4000.

2 Petitioners' request for a declaratory ruling invalidating the Philadelphia ordinance remains pending. *See* Satellite Broadcast and Communications Association Petition for Declaratory Ruling Regarding Application of the Over-the-Air Reception Device Rule to Certain Provisions of the Philadelphia, Pennsylvania Code, CSR-8541-O (filed Oct. 26, 2011) ("Philadelphia Petition"). Given the similarity between the Chicago and Philadelphia Ordinances, Petitioners hereby incorporate by reference SBCA's petition, as well as each of the Petitioners' respective pleadings, from that proceeding.

And Chicago has made *no* attempt to justify its restrictions based on public safety, health, or historic preservation grounds, much less to demonstrate that it treats comparable devices similarly. The Commission should immediately declare Chicago's Ordinance unenforceable.

FACTS

On November 2, 2011, Alderman Rey Suarez introduced the Ordinance, which was referred to the Chicago City Council's Committee on Zoning, Landmarks, and Building Status. Upon learning of this action, a local representative for the Petitioners reached out to Alderman Suarez to express concerns about his proposed legislation. Subsequently, representatives of DIRECTV and SBCA met in person with Alderman Suarez and staff from Chicago's Department of Law and its Licensing and Inspections Department on January 10, 2012, to describe new industry standards that would, in their view, render the ordinance unnecessary. At this meeting, concerns regarding the ordinance and OTARD were raised.

On January 26, 2012, the Zoning Committee held a hearing on the bill at which SBCA submitted written testimony raising concerns regarding the Ordinance's legality. The Committee nonetheless referred the Ordinance to the full City Council. Subsequent to such referral, representatives of the Petitioners wrote to each of the Aldermen, and wrote to and spoke with representatives of the Department of Law, regarding the Ordinance's legal infirmities. During that time period, the Ordinance was amended to remove certain provisions. The Ordinance, as amended, passed the City Council on March 14, 2012. In the absence of the Mayor's signature, the effective date of the Ordinance is April 18, 2012, with Section 3 of the ordinance having the effective date of July 17, 2012.

THE ORDINANCE

The Ordinance adds a new provision to the Chicago Zoning Ordinance governing "satellite dish antennas" (and only satellite dish antennas).[3] This provision, in turn, has three sections: one providing rules for antenna placement, the second providing additional rules where compliance with the first set of rules is "not technically feasible," and a third requiring removal of unused dishes. The provision also has a preamble making it "subject to 47 C.F.R. § 1.4000, as amended, and other applicable law,"[4] and subject to "lawful restrictions on the use of common areas."[5]

Paragraph One: Antenna Placement.[6] This paragraph states that all satellite antennas "shall be placed in locations that are not visible from any street adjacent to the property upon which such equipment is located." Moreover, no such antenna may be placed between the façade and the street, unless the device is "wholly within a balcony or patio area that is under the exclusive use or control of the user." If compliance with this paragraph is not "technically feasible," the installer must provide the user with a signed statement indicating that, based on "actual testing conducted at the property," the antenna cannot be installed in compliance with the paragraph. Compliance is not "technically feasible" where it "would result in a material delay or reduction in signal reception or significant additional cost to the user." A copy of the statement

---

3 Chicago Zoning Ordinance, Ch. 17-9-0203. All references to the Chicago Zoning Ordinance in this Petition are to that Ordinance as amended. The Ordinance is attached hereto as Exhibit A.

4 As Petitioners believe that each of the provisions of the Ordinance violates OTARD, the OTARD "savings clause" is meaningless. In any event, use of a savings clause in this manner likely violates OTARD *in and of itself*. As discussed in Part I of the Argument, below, partial pre-emption of the Ordinance would leave Chicago residents with no practical way of knowing what the law is.

5 Petitioners take the phrase "subject to lawful restrictions on the use of common areas" as confirming that the Ordinance does not require antenna placement in common areas where landlords or homeowners associations have restricted such placement.

6 All citations in this paragraph are to Chicago Zoning Ordinance, Ch. 17-9-0203A(1).

must be provided to the user and maintained at the office of the installer/provider for an indefinite period.

Paragraph Two: Installation In Cases of Technical Infeasibility.[7] Where compliance with Paragraph One is infeasible, and the installer has issued and maintained the proper paperwork, satellite antennas may only be placed in locations that are "minimally visible from any street adjacent to the subject property." In addition, it must be "shielded from view from adjacent streets to the greatest extent possible by landscaping, lattice, fencing or structural or architectural elements of the building on which the satellite dish antenna is located (e.g., a balcony, bay window, chimney, dormer or parapet)." And, "if side-mounted," it must be "attached to a building wall facing the subject property's interior side property line and set back a minimum of ten feet from any building wall facing an adjacent street." Unlike Paragraph One, Paragraph Two contains no exception for technical infeasibility.

Paragraph Three: Antenna Removal.[8] This paragraph provides in full that "[a]ll satellite dish antennas and associated mounting equipment and hardware shall be disconnected and removed when such devices are no longer in service." The paragraph contains no exceptions for technical infeasibility. Nor, for that matter, does it assign responsibility for disconnecting or removing satellite antennas, or define what "no longer in service" means.

LEGAL STANDARD

[7] All citations in this paragraph are to Chicago Zoning Ordinance, Ch. 17-9-0203A(2).

[8] All citations in this paragraph are to Chicago Zoning Ordinance, Ch. 17-9-0203A(3).

The Commission's OTARD rules preempt restrictions on antenna[9] placement if such restrictions both fall within OTARD's scope,[10] and "impair" a viewer's ability to receive programming (*e.g.*, unreasonably delay or prevent installation, maintenance or use; unreasonably increase the cost of installation, maintenance or use; or preclude reception of an acceptable signal).[11] Such restrictions are permitted, however, only if they are *all* of the following: (1) necessary to accomplish a clearly defined, legitimate safety objective or necessary for historical preservation of a location on or eligible for the National Register of Historic Places,[12] (2) no more burdensome than necessary to achieve the safety or historical preservation objectives stated above,[13] and (3) not greater than those imposed on any similar appurtenances or fixtures.[14]

Those who seek to restrict antennas bear the burden of demonstrating that their restriction complies with the OTARD rules.[15] No "legal action of any kind" may be taken to enforce

---

9 The OTARD rules generally govern antennas that are "used to receive [DBS] service" and are one meter or less in diameter, or any size if located in Alaska, and include a mast supporting such an antenna. 47 C.F.R. § 1.4000(a).

10 47 C.F.R. § 1.4000(a)(1) (providing that OTARD governs restrictions of antennas on "property within the exclusive use or control of the antenna user where the user has a direct or indirect ownership or leasehold interest in the property"). As described in Part I of the Argument, below, Petitioners believe that this provision applies only where such restrictions are imposed by property owners and homeowner associations and not in the case of municipal restrictions, such as that at issue here.

11 47 C.F.R. § 1.4000(a)(3).

12 47 C.F.R. §§ 1.4000(b)(1)(2).

13 47 C.F.R. § 1.4000(b)(3).

14 *Id.*

15 47 C.F.R. § 1.4000(g).

restrictions that violate the rules.[16] Moreover, except with respect to restrictions pertaining to safety and historic preservation, enforcement efforts must be suspended pending review.[17]

ARGUMENT

Chicago's Ordinance violates OTARD in nearly every respect possible. Even assuming the protections of the OTARD rules only apply to exclusive use areas in these circumstances (an assumption that Petitioners vigorously dispute), the Ordinance plainly restricts satellite antennas in exclusive and non-exclusive areas alike. It would unreasonably delay or prevent installation, maintenance or use; unreasonably increase the cost of installation, maintenance or use; and preclude reception of an acceptable signal. And Chicago does not even attempt to justify its ordinance on public safety or historic preservation grounds, much less apply it evenhandedly to appurtenances other than satellite antennas.

I. CHICAGO'S ORDINANCE FALLS WITHIN THE SCOPE OF THE OTARD RULES

The Commission's rules, by their terms, apply to restrictions on "property within the exclusive use or control of the antenna user where the user has a direct or indirect ownership or leasehold interest in the property."[18] Petitioners believe that the "exclusive use" limitation in this provision applies only to restrictions by property owners and HOAs, not to restrictions (such as the Ordinance) imposed by state and local governments. In a Petition for Rulemaking filed this week, which Petitioners hereby incorporate by reference, Petitioners sought clarification on

---

16 47 C.F.R. § 1.4000(a)(4).

17 *Id.*

18 14 C.F.R. § 1.4000(a)(1).

this point. They argued that the "exclusive use" limitation is a creation of the Commission, not Congress; that it was created in order to protect the private rights of property holders against government intrusion; and that not applying the limitation to municipal restrictions would ensure that it remains in line with the concerns that animated it.[19] That petition remains pending.

Even assuming, *arguendo*, that the exclusive use limitation applies here, however, Chicago's Ordinance would plainly fall within the scope of the OTARD rules. Chicago makes almost no effort to restrict the ambit of its Ordinance to non-exclusive "common areas." Thus:

- Paragraph One's requirement that all satellite antennas "shall be placed in locations that are not visible from any street adjacent to the property upon which such equipment is located"[20] on its face applies to antennas in exclusive-use and common areas alike.
- Paragraph One's requirement that no such antenna may be placed "between the façade of a building and any street adjacent to the subject property, unless the device is wholly within a balcony or patio area that is under the exclusive use or control of the user" also applies to antennas in exclusive-use and common areas alike. As Petitioners described with respect to Philadelphia's ordinance, many locations other than balconies and patios are exclusive use areas.[21] Indeed, with respect to single-family dwellings, it is fair to say that *most* locations between the façade and the street are exclusive use locations. (For example, in a user-owned, single-family dwelling, the front exterior is almost by definition an exclusive use area.) The question of exclusive use or control of property is

---

19 *See* Petition for Rulemaking to Amend the Commission's Over-the-Air Reception Device ("OTARD") Rules, MB Docket No. _____ (filed Apr. 18, 2012).

20 Chicago Zoning Ordinance, Ch. 17-9-0203A(1).

21 *See, e.g.*, Comments of DIRECTV and DISH Network, CSR-8541-O, at 6 (filed Dec 22, 2011) ("DIRECTV and DISH Network Philadelphia Comments").

of course governed by the individual deeds and leases applicable to a particular building and its residents.[22] By essentially declaring patios and porches to be the only exclusive use areas outside the scope of its Ordinance (and by specifying that antennas must always be entirely within such areas in order to fall within the exclusive use language[23]), Chicago simply ignores this requirement.

- Paragraph Two's rules governing installation where compliance with paragraph 1 is infeasible make no distinction between antennas in exclusive-use and common areas.[24]
- Paragraph Three's rules governing unused antennas makes no distinction between exclusive-use and common areas.[25]

Petitioners concede that *some* of the areas subject to the Chicago Ordinance would be common areas. That, however, is not sufficient to place the Ordinance outside of OTARD's scope even with respect to satellite antennas in those areas. As Petitioners explained with respect to Philadelphia's Ordinance, even an outright prohibition on all satellite antennas within city limits would cover antennas in both exclusive use and common areas. But nobody thinks that

---

22 *Philip Wojcikiewicz*, 22 FCC Rcd. 9858, ¶ 7 (2007) ("The Commission has previously found that, as a general matter, roofs or exterior walls may, in some circumstances, be restricted access areas where tenants are not granted exclusive or permanent possession. However, the lease, condominium declaration, deed or other controlling document is dispositive in individual situations.").

23 The Commission's informal guidance states that "[t]he OTARD rule does not prohibit restrictions on antennas installed beyond the balcony or patio *of a condominium or apartment unit if such installation is in, on, or over a common area*." FCC, Over-the-Air Reception Devices Rule, http://www.fcc.gov/guides/over-air-reception-devices-rule#QA (emphasis added). Even assuming this informal guidance is correct—which Petitioners do not concede—the Ordinance applies to balconies and patios that are neither of a condominium or apartment and to antenna installations that are not in, on, or over a common area.

24 Chicago Zoning Ordinance, Ch. 17-9-0203A(2).

25 Chicago Zoning Ordinance, Ch. 17-9-0203A(3).

such a prohibition would be legal with respect to satellite antennas in common areas.[26] The same holds true for Chicago's Ordinance. Construing it to be effective with respect to common areas would unlawfully place the burden on satellite users to demonstrate that the Ordinance should not apply to their particular antenna installation, when OTARD places that burden on those seeking to restrict such antennas.[27] It would also leave Chicago residents—most of whom doubtless have no idea what OTARD is, much less how OTARD preemption works—with the misimpression that their satellite antennas are illegal when in fact they are not.

II. CHICAGO'S ORDINANCE IMPAIRS VIEWING

The OTARD rules preempt restrictions that "impair" viewing, which the Commission has defined as those that "unreasonably delay or prevent installation, maintenance or use, or unreasonably increase the cost of installation, maintenance or use, or preclude reception of an acceptable signal."[28] Each and every provision of the Ordinance falls within this definition. Indeed, only the first of the Ordinance's three paragraphs even attempts to avoid impairment at all.

A. Paragraph One's Restrictions on Antenna Placement

Paragraph One contains two separate restrictions on antenna placement: a general requirement that satellite antennas be placed where not visible from the street, and a specific prohibition on placement between the façade and the street.[29] The provisions do not apply where

---

26 Reply Comments of DIRECTV and DISH Network, CSR-8541-O, at 3 (filed Jan. 6, 2012).

27 47 C.F.R. § 1.4000(g).

28 47 C.F.R. § 1.4000(a)(3).

29 Chicago Zoning Ordinance, Ch. 17-9-0203A(1).

"compliance would result in a material delay or reduction in signal reception or significant additional cost to the user."[30]

This, however, is not the language used in OTARD. The Ordinance does not apply in cases of *material* delay, *material* reduction in signal reception, and *significant additional* cost to the user. OTARD speaks instead of *unreasonable* delay, *unreasonable* cost, and *any* "preclus[ion] of reception of an acceptable signal."[31]

These differences may seem small, but they matter. Basic canons of statutory interpretation suggest that the legislative use of different words results in a different meaning.[32] Chicago was certainly aware of the OTARD language, as it references OTARD in the Ordinance's preamble. Its choice to use different words in the Ordinance can be presumed to evince an intent to be more restrictive. This presumption is even stronger where, as here, Chicago knew that this very issue—over the very same word choice—is being litigated with respect to the Philadelphia Ordinance.[33]

Even setting aside canons and presumptions, Chicago's words are more restrictive than those in OTARD. "Significant additional cost" requires a higher standard than "material" and a

---

30 *Id.*

31 47 C.F.R. § 1.4000(a)(3).

32 *See, e.g.*, *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) ("identical words used in different parts of the same act are intended to have the same meaning"); *Maxwell on the Interpretation of Statutes* 282 (12th Ed. 1969), *reprinted in* Eskridge, *et al.* Legislation 834 (3d ed. 2001) ("From the general presumption that the same expression is presumed to be used in the same sense throughout the Act or a series of cognate Acts, there follows the further presumption that a change of wording denotes a change in meaning."); *Lindh v. Murphy*, 521 U.S. 320 (1997) (reasoning by negative implication that new rules restricting prisoner access to the courts were not applicable to then-pending cases).

33 In Petitioners' conversations with the City of Chicago Law Department, city attorneys confirmed that they were familiar with the pleadings in the Philadelphia proceeding.

much higher standard than "unreasonableness."[34] Indeed, the following three hypotheticals (first introduced by SBCA in its Philadelphia Reply Comments[35]) help illustrate the point:

Scenario #1: Comcast increases the cost of its programming to subscribers in Chicago by 4% in a given year. While this type of increase might not be material, let alone significant, it could be unreasonable—especially if no other pay TV service was increasing its rates or it was more than double Comcast's typical annual rate increases. In other words, in the subscribers' view, it would be outside the bounds of reason. But it would not be important enough to be material, and it certainly would not rise to the level of "significant."

Scenario #2: Comcast increases the cost of its programming by 8% to 10% for subscribers in Chicago. This would likely be viewed by subscribers as both unreasonable and material. But it's unclear that even this type of increase, which amounts to a few extra dollars per month for the average subscriber, would rise to the level of a "significant additional cost"—*i.e.*, the standard that the City has set as the trigger for its cost of installation increase in the Ordinance.

Scenario #3: Now suppose that Comcast increases the cost of its programming by 25% for subscribers in Chicago. That sort of increase would clearly be deemed to be unreasonable, material, and a significant additional cost to subscribers.

As these scenarios illustrate, a smaller increase in the cost of installation could also be "unreasonable" and, therefore, violate OTARD, yet still not meet the "significant additional cost"

---

[34] Significant is defined as "a noticeably or measurably large amount," while the definition of unreasonable is limited to "exceeding the bounds of reason or moderation." Merriam Webster's Collegiate Dictionary 1091, 1295 (10th ed. 1996).

[35] Reply Comments of SBCA, CSR No. CSR-8541-O (filed Jan 6, 2012).

standard set forth in the Ordinance. Likewise, a shorter delay in installation might also be "unreasonable" yet still not meet the "significant delay" standard set forth in the Ordinance.

B. Paragraph One's Testing and Paperwork Requirements

Just as Paragraph One's substantive antenna placement requirements violate OTARD, so too do the paragraph's procedural requirements for demonstrating technical infeasibility. Specifically, installers may only rely upon "actual testing conducted at the property" in order to determine that the antenna cannot be installed in compliance with the paragraph, and then maintain paperwork in order to demonstrate such compliance.[36] In their objection to similar language promulgated by Philadelphia, Petitioners noted (1) that requiring "actual testing" before certifying alternative locations are not available would be costly; (2) that some installers may find it easier to forego the process altogether, and (3) that the Commission had invalidated similar certification restrictions in the past.[37] They noted further that certification would have the practical effect of making self-installation impossible, because self-installers must comply with the placement rules but have no recourse to certify that alternate locations were necessary.[38]

---

36 Chicago Zoning Ordinance, Ch. 17-9-0203A(1).

37 DIRECTV and DISH Network Philadelphia Comments at 7-9, *citing See Star Lambert/SBCA,* ¶ 29 (invalidating antenna placement requirement in which city "allow[ed] deviation from [the requirement] only if an antenna user or installer demonstrates to a Building Official that the installation of the antenna at the location specified by the Ordinance precludes reception of an acceptable signal"); *Michael J. MacDonald,* 13 FCC Rcd. 4844, ¶ 27 (CSB 1997) (invalidating requirement of "a certificate from the dealer or installer certifying that installation in a location other than that preferred by Savannah . . . is necessary to avoid impaired reception"). In that proceeding, Philadelphia argued that these cases were inapposite because they involved "pre-approval." But a certification provision with penalties for noncompliance cannot reasonably be characterized as anything other than "pre-approval," even if (as presumably was the case in both *Star Lambert/SBCA* and *MacDonald*) installers need submit such certifications only upon request, as appears to be the case with Philadelphia.

38 *Id.*

Certification requirements by their very nature "unreasonably" raise the cost of and delay the installation of satellite antennas.

Worse yet, however, is the type of testing that Chicago could require under the statute. Had the Ordinance itself specified, for example, that installers could use line-of-sight testing (*i.e.*, the sort of testing they now use to determine whether potential subscribers can receive satellite signals at all), Petitioners would have less reason to object.[39] As written, however, the Ordinance would allow Chicago to require installers to physically mount a dish in various locations and engage in signal testing using equipment similar to that used for determining distant signal eligibility.[40] That kind of "testing" would cost up to hundreds of dollars per subscriber. Chicago can argue, as did Philadelphia, that the Ordinance does not specify such testing. But the use of the words "actual testing" would permit Chicago to require it; and at a minimum, the ambiguity would be an additional barrier to those seeking installation in an alternative area but afraid of violating the Ordinance. Such uncertainty is unfair to satellite installers, costly to satellite subscribers, and fundamentally inconsistent with OTARD.

C. Paragraph Two's Antenna Placement Restrictions

Paragraph Two is where Chicago's Ordinance outdoes even Philadelphia's in its deviation from OTARD's strictures. In promulgating Paragraph One's antenna placement restrictions, Chicago at least attempted to include savings language parallel to—if demonstrably more restrictive than—the standards set forth in OTARD. In Paragraph Two, which sets forth rules for satellite installation where installation under Paragraph One is technically infeasible, Chicago did not even do that. Rather, it requires satellite antennas to be "minimally visible from

---

39 Even such a rule, however, could impose unreasonable costs and delay if interpreted, for example, as requiring testing of every nook and cranny of the yard or the use of a bucket truck and crane.

40 47 C.F.R. § 73.686 (setting forth rules for field strength measurements).

any street adjacent to the subject property" and to comply with specific shielding and setback requirements, regardless of the extent to which such compliance raises costs, delays service, or precludes reception.[41] Even if the Commission were to conclude, incorrectly, that Paragraph One complied with OTARD, it simply could not so do with respect to Paragraph Two.

D. Paragraph Three's Antenna Removal Requirements

Paragraph Three's requirement to remove antennas, much like Paragraph Two's rules governing placement in cases of "infeasibility," applies regardless of its effect on cost, delay, or signal reception.[42] It, too, "impairs" viewing, and thus violates OTARD.

To begin with, Chicago's removal requirement impairs viewing for low-income and immigrant subscribers. In this tough economic climate, not everyone can pay his monthly service fees on a timely basis. Many customers, especially those hit hardest by the Great Recession, have to temporarily forego pay TV service while they focus on more pressing concerns, like feeding their families, paying the rent, and clothing their children. Indeed, it is not uncommon for customers to subscribe to satellite service on an intermittent basis, paying when they can and going without when they cannot. This is especially true of customers who purchase their service and equipment in full up front because they do not have the credit scores to qualify for a lease arrangement. If Chicago had its way, these low income and poor credit customers would have to pay for the acquisition and installation of a new antenna each and every time they

---

41 The provision's shielding requirements state that the antenna must be "shielded . . . to the greatest extent possible." Chicago Zoning Ordinance, Ch. 17-9-0203A(2). This standard plainly does not comport with that in OTARD, as "the greatest extent possible" would require shielding even where such shielding "unreasonably" raises costs or delays installation. The set-back requirement lacks even this language: *all* antennas must be attached to side walls and set back a minimum of ten feet. *Id.*

42 Chicago Zoning Ordinance, Ch. 17-9-0203A(3).

wanted to resume satellite service. This, without doubt, would both "unreasonably delay" and "increase the cost" of "installation" and "use" of antennas.[43]

Chicago's removal requirement also impairs viewing with respect to people who move into new residences. Both DIRECTV[44] and DISH Network[45] have "movers programs," which generally permit existing subscribers to waive installation fees when they move from one residence to another. The economics of these programs depend on subscribers leaving their satellite antennas behind when they move—just as cable customers leave cable infrastructure behind when *they* move. Were subscribers required to remove antennas when they leave a residence, new residents would have pay for installation of new antennas. This, too, would both "unreasonably delay" and "increase the cost" of "installation" and "use" of antennas.[46]

Last, a removal requirement would impair viewing with respect to the "maintenance" of satellite antennas. It imposes obligations on satellite maintenance that are hopelessly vague, perhaps even unconstitutionally so.[47] And it imposes obligations that may be beyond the legal authority of satellite providers to comply. Providers and their technicians cannot enter a customer's property in order to access her antenna without first obtaining the customer's

---

43 47 C.F.R. § 1.4000(a)(3)(i)-(ii).

44 DIRECTV Movers Deal, http://www.directv.com/DTVAPP/content/movers.

45 DISH Moving, http://www.mydish.com/perks/customer-programs/moving/?WT.ac=ECM_MKTG_MYDISH_SMTL_0212_PerksMovingServices

46 47 C.F.R. § 1.4000(a)(3)(i)-(ii).

47 The provision states that "[a]ll satellite dish antennas and associated mounting equipment and hardware shall be disconnected and removed when such devices are no longer in service." *Id.* The provision does not specify who must disconnect and remove antennas. Nor, for that matter, does it specify what it means for an antenna to be "no longer in service." This neither provides readers "of ordinary intelligence a reasonable opportunity to know what is prohibited," *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972), nor does it set forth "relatively clear guidelines as to prohibited conduct" and provide "objective criteria" to evaluate whether the provision has been complied with. *Posters 'N' Things, Ltd. v. United States*, 511 U.S. 513, 525–526 (1994). As such, it impermissibly encourages arbitrary and discriminatory enforcement. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

permission (or that of the person who owns the property). Failure to do so could potentially expose the provider and/or the technician to a trespassing claim. Moreover, the customer (not the satellite provider) is the legal owner of the antenna once it is installed on the customer's premises. That does not change even if the antenna is no longer active. Accordingly, (once again) the provider would need to obtain permission from the customer before touching his or her personal property. Failure to do so could potentially expose the provider or technician to a trespass or similar claim. There is no guarantee that such permission will be forthcoming. The City cannot legislate a requirement that could obligate satellite TV providers break the law, or even expose themselves to the possibility of legal liability, simply because it wants to address aesthetic concerns. Any attempt by satellite carriers to comply with such a regime would "unreasonably increase the cost" of "maintenance" of satellite antennas.[48]

III. CHICAGO CANNOT JUSTIFY ITS ORDINANCE

Not all zoning restrictions that impair television reception violate OTARD. Cities like Chicago can impose even such restrictions if they are: (1) necessary to promote *bona fide* safety, or historic preservation objectives; (2) no more burdensome than necessary to achieve these objectives; and (3) applied evenhandedly among OTARD-covered devices and appurtenances of similar size. Restrictions that impair reception, in other words, are permissible if they can be justified. Chicago, however, has not even attempted to set forth the required justification.

[48] 47 C.F.R. § 1.4000(a)(3)(i)-(ii).

A. Chicago Articulates No Safety Or Historic Preservation Justification

The OTARD rule permits restrictions only if they are "necessary to accomplish a clearly defined, legitimate safety objective"[49] or if they are "necessary to preserve a prehistoric or historic district, site, building, structure or object included in, or eligible for inclusion on, the National Register of Historic Places."[50] In the first case, the safety objectives must be "either stated in the text, preamble, or legislative history of the restriction or described as applying to that restriction in a document that is readily available to antenna users."[51]

Chicago offers no justification whatsoever for its Ordinance. Nothing appears in the "text or preamble" of the Ordinance itself.[52] And all other materials even casually associated with the Ordinance[53] make abundantly clear that Chicago's interests are in the appearance of satellite antennas, not in health, safety, or historic preservation.

Perhaps the best sense of Chicago's justification come from the statements of the Ordinance's sponsor, Ray Suarez. According to the Chicago Tribune, Alderman Suarez "appeared at a Zoning Committee meeting and showed photos of buildings in his ward with as many as nine dishes affixed to the side facing the street . . . . 'It makes it look terrible,' Suarez

---

49 47 C.F.R. § 1.4000(b)(1).

50 *Id.* § 1.4000(b)(2).

51 *Id.* § 1.4000(b)(1).

52 In this respect, Chicago's Ordinance differs from that of Philadelphia, which contained *pro forma* (but non substantive) safety and historic preservation language in its preamble).

53 Petitioners do not concede that committee hearings constitute "legislative history" for purposes of the OTARD rules. Nor are they aware that any other materials exist "applying to that restriction in a document that is readily available to antenna users for purposes of the OTARD rule," as those phrases are used in 47 C.F.R. § 1.4000(b)(1).

said."[54] Alderman Suarez is entitled to his opinion. But Chicago is not entitled to restrict over-the-air antennas based on such an opinion.

B. Chicago Cannot Demonstrate that Its Ordinance Is No More Burdensome Than Necessary

Because Chicago has failed to articulate any of the specified objectives for its Ordinance, *a fortiori* it cannot argue that the Ordinance is "no more burdensome than necessary" to achieve such objectives.[55]

C. Chicago Does Not Regulate Evenhandedly

Were there any remaining question as to the legality of Chicago's Ordinance, its failure to regulate other comparable devices would remove all doubt.[56] As far as DIRECTV and DISH Network are aware, Chicago has enacted no similarly comprehensive regulatory scheme for "similar devices…such as air conditioning units [or] trash receptacles."[57] It does not regulate equipment installed on a building's façade by Chicago-franchised cable operators. Chicago may

---

54 John Byrne, Clout Street, *Chicago Alderman Pushes Satellite Dish Crackdown*, CHICAGO TRIBUNE, Jan. 26, 2012, *available at* http://www.chicagotribune.com/news/politics/clout/chi-chicago-aldermen-pushes-satellite-dish-crackdown-20120126,0,4994859.story.

55 *Compare, e.g.*, *United States v. Virginia*, 518 U.S. 515, 533, (1996) (holding that, in sex discrimination lawsuits, the government must show that its gender classification is substantially related to a sufficiently important government interest" and that this test requires a "genuine" justification, not one that is "hypothesized or invented *post hoc* in response to litigation"); *with Frisby v. Schultz*, 487 U.S. 474, 477 (1988) (accepting without question governmental interest articulated in preamble of legislation).

56 Chicago's failure to regulate other devices is relevant in two separate respects. First, nondiscriminatory treatment is necessary to a defense of an otherwise impermissible ordinance based on safety or historic preservation grounds. 47 C.F.R. § 1.4000(b)(1)-(2). Second, nondiscriminatory treatment is a key component of whether the costs or delay caused by a particular provision is "unreasonable" or not. 47 C.F.R. § 1.4000(a)(3)

57 *Preemption Of Local Zoning Regulation Of Satellite Earth Stations and Implementation Of Section 207 Of The Telecommunications Act Of 1996; Restrictions on Over-the-Air Reception Devices: Television Broadcast Service and Multichannel Multipoint Distribution Service*, 11 FCC Rcd, 19276, 19288, ¶ 19 (1996), *recon. granted in part and denied in part*, 13 FCC Rcd. 18962 (1998).

indeed regulate graffiti, trash, and the like. But these things are not similar to satellite antennas, and Chicago does not regulate them similarly.

* * *

OTARD was designed to ensure that aesthetic concerns do not prevent consumers from subscribing to competitive multichannel video services, including satellite direct-to-home services. Chicago, however, has enacted an Ordinance that strikes at the very heart of the OTARD rule. Accordingly, the Commission should declare that the Ordinance violates OTARD and is therefore unenforceable.

Respectfully submitted,

/s/
Lisa Volpe McCabe
Director, Public Policy & Outreach
SATELLITE BROADCASTING & COMMUNICATIONS ASSOCIATION
1100 17th Street NW, Suite 1150
Washington, D.C. 20036
(202) 349-3640

/s/
Susan Eid
Executive Vice President,
Government Affairs
Andrew Reinsdorf
Senior Vice President, Government Affairs
Stacy R. Fuller
Vice President, Regulatory Affairs
DIRECTV, LLC
901 F Street, NW, Suite 600
Washington, DC 20004
(202) 383-6300

/s/
Jeffrey H. Blum
Senior Vice President &
Deputy General Counsel
Alison A. Minea
Corporate Counsel
DISH NETWORK L.L.C.
1110 Vermont Ave NW, Suite 750
Washington, DC 20005
(202) 293-0981

William M. Wiltshire
Michael Nilsson
WILTSHIRE & GRANNIS LLP
1200 Eighteenth Street, NW
Washington, DC 20036
(202) 730-1300
Counsel for DIRECTV, LLC

April 19, 2012

DECLARATION

I, Lisa Volpe McCabe, do hereby declare and state under penalty of perjury as follows:

1. I am the Director, Public Policy & Outreach, for the Satellite Broadcasting and Communications Association ("SBCA").

2. This Declaration is submitted in support of the foregoing Petition for Declaratory Ruling, and is submitted in accordance with the requirements of Section 1.4000(h) of the Commission's Rules. '

3. I declare under penalty of perjury that any and all allegations of fact contained in the foregoing Petition for Declaratory Ruling are true and correct to the Best of my knowledge.

4/17/2012
Date

Lisa Volpe McCabe
Lisa Volpe McCabe

CERTIFICATE OF SERVICE

I hereby certify that, on this 19th day of April, 2012, a copy of the foregoing Petition for Declaratory Ruling was served by overnight mail upon:

City of Chicago
Law Department
121 North LaSalle Street
Suite 600
Chicago, IL 60602

/s/_____
Laura Merkey